Supreme Court, U.S.
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Supreme Court of the United States

ROY L. ENDSLEY, III and STEPHEN GRAHAM, individually and on behalf of those similarly situated,

Petitioners,

v.

THE CITY OF CHICAGO, a municipal corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. POLELLE
Counsel of Record
JOHN MARSHALL
LAW SCHOOL
315 South Plymouth Court
Chicago, Illinois 60604
(312) 987-1440

Of Counsel:

JAMES G. MEYER
IALONGO & MEYER
33 North Dearborn Street
Suite 1300
Chicago, Illinois 60602
(312) 332-4701

LEE J. SCHWARTZ
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602
(312) 553-5050

Attorneys for Petitioners

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the market participation exception to the dormant Commerce Clause provides a defense to the City of Chicago in its operation of a tollway in the Interstate Highway system, under which the City uses toll revenues to amortize non-recourse bonds, a substantial portion of the proceeds of which were diverted to purposes unrelated to the operation and maintenance of the tollway?

2. Whether the dismissal of Plaintiffs' antitrust claims against a municipal corporation on a Motion to Dismiss under Sections 1 and 2 of the Sherman Act, 15 United States Code Sections 1 and 2 was premature especially when an important issue exists regarding the relationship between the state action immunity defense of antitrust law and the market participation exception of the dormant Commerce Clause?

3. Whether Sections 301 and 129(a)(3) of Title 23 of the United States Code, which limit toll charges on federally funded highways, are interlocking and unified statutory provisions for whose violation 42 United States Code Section 1983 provides a remedy independent of an implied private cause of action under the case of *Cort v. Ash*, 422 U.S. 66 (1975) and its progeny?

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STATEMENT OF JURISDICTION

1. The judgment of the United States District Court for the Northern District of Illinois was issued on June 16, 1999. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 12, 2000. The United States Court of Appeals for the Seventh Circuit denied the petition for rehearing on November 16, 2000.

2. The statutory provisions conferring jurisdiction on this Court to review on a *Writ of Certiorari* the decision in question are 28 U.S.C. § 1254 and Rule 13 of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I §8 of the United States Constitution provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

23 U.S.C. § 301 provides in pertinent part: "Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds."

23 U.S.C. § 129(a)(1) provides in pertinent part:

"Notwithstanding section 301 of this title and subject to the provisions of this section, the Secretary shall permit Federal participation

* * *

(B) reconstructing, resurfacing, restoring, and rehabilitating a toll highway, bridge, or tunnel . . . or approach thereto."

23 U.S.C. § 129(a)(3) provides in pertinent part:

"Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department), having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. . . ."

42 U.S.C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

15 U.S.C. § 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments at the discretion of the court."

15 U.S.C. § 2 provides in pertinent part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof,

shall be punished by fine . . . not exceeding three years, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

On December 17, 1998, the Plaintiffs, Roy L. Endsley III and Stephen Graham, residents of Indiana and Illinois, respectively, and United States citizens, filed a Complaint in the United States District Court for the Northern District of Illinois against the City of Chicago, and prayed for a Declaratory Judgment, an Accounting, and for Injunctive and further relief. The Complaint was filed as a Class Action. However, the District Court on its own motion denied class certification, without prejudice, on the ground certification had not been promptly sought by either Plaintiffs or the Defendant.

The Complaint challenges the City's 1996 decision to use a portion of the tolls collected on the Chicago Skyway as the source of funds to pay the principal and interest on bonds issued for non-tollway transportation expenses and to authorize the use of excess toll funds for non-tollway purposes. The allegations are that the Defendant, City of Chicago, operates, maintains, and controls the Chicago Skyway Toll Bridge System, which is part of the Interstate Highway System established under Title 23 U.S.C. § 101 *et seq*. The Chicago Skyway is a toll bridge which includes about 7.8 miles of U.S. Interstate Route 90 and which facilitates extensive interstate commerce and travel between the Indiana Tollway at the Indiana-Illinois border and the Dan Ryan Expressway (Interstate Routes 90-94) in Chicago, Illinois.

The Chicago Skyway was built between 1955 and 1958 and paid for by private funds raised by the issuance and sale of original Chicago Skyway bonds by the City between 1955 and 1957. The costs of operation of the Chicago Skyway portion of Interstate 90 involved in this litigation, including debt service, were and are paid entirely out of tolls and concessions charged to skyway users. City revenues do not support the Chicago Skyway. Revenue bonds backed solely by tolls paid by users support the Chicago Skyway.

Between 1958 and 1972 the City raised tolls on the Chicago Skyway three times. In 1972 Chicago Skyway bondholders sued the City in the United States District Court for the Northern District of Illinois to compel the City to raise the tolls further. From 1972, until the dismissal of the litigation in 1994, the City increased the skyway tolls 11 times pursuant to federal court order. The current toll rate was set by the United States District Court in 1993.

By 1995 the volume of traffic on the Chicago Skyway had increased to such an extent that the City of Chicago received annual gross toll revenues of over $29 million. This amounted to about twice the total expenses of the Chicago Skyway, including debt service. In 1996, due to the increase in net revenue, the City refinanced its earlier bonds with Series 1996 Bonds. The Series 1996 Bonds are not a debt of the City nor of the State of Illinois. The sole source of revenue for the payment of these Series 1996 Bonds is the tolls and concessions paid by users of the Chicago Skyway.

The Series 1996 Bond indenture additionally provides that net revenues from the skyway tolls, after paying

operating expenses and debt service, may be used to pay for "City Transportation Improvements" not related to the upkeep of the Chicago Skyway. By issuing these Series 1996 Bonds, which were backed only by revenue from the Chicago Skyway, the City not only repaid the aggregate principal of the earlier issued bonds but raised an additional $52 million for non-tollway projects. About one-third of the $179,765 million collected from the sale of Series 1996 Bonds are being and will be used to finance non-Skyway projects of the City of Chicago. Based on current toll schedules the projected net revenues of the Chicago Skyway up through the year 2011 are predicted to run between $11.5 and $17.1 million annually. This would constitute about 40%-60% of total Chicago Skyway toll revenues.

To remedy what Plaintiffs believed to be an unlawful diversion of toll revenue to fund non-Skyway costs, they filed this Complaint. Plaintiffs allege in Count I a violation of 23 U.S.C. § 129, in Count II a violation of the Sherman Act, 15 U.S.C. §§ 1 & 2, in Count III a violation of the Commerce Clause of the United States Constitution, and in Count IV a violation of Illinois constitutional, statutory, and common law. The Defendant filed a motion to dismiss Counts I-III under Fed.R.Civ.P. 12(b) and a motion to stay Count IV. On June 16, 1999, the District Court granted Defendant's motion to dismiss Counts I-III, with prejudice, and denied Defendant's motion to stay Count IV on the ground that the motion was moot. The United States Court of Appeals affirmed this decision on October 12, 2000, and the Plaintiffs' petition for rehearing was denied November 16, 2000.

REASONS FOR GRANTING THE WRIT

I. WITHOUT A VALID EXCEPTION, THE DORMANT COMMERCE CLAUSE PROHIBITS A MUNICIPALITY FROM USING INTERSTATE HIGHWAY TOLL REVENUES FOR NON-TOLLWAY USES. THE CITY OF CHICAGO SHOULD NOT BE ALLOWED TO DIVERT INTERSTATE HIGHWAY TOLL REVENUE FOR NON-TOLLWAY PURPOSES UNDER THE MARKET PARTICIPATION EXCEPTION.

Freedom from state action that violates the dormant Commerce Clause is one of the rights, privileges, and immunities protected by 42 U.S.C. §1983. *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 585 (1985). Roy L. Endsley III, one of the plaintiffs in this case, has at all times pertinent to this lawsuit been a resident of Indiana. (App. *infra*, C-2). Absent the market participation exception to the dormant Commerce Clause, Plaintiffs assert that at least the portions of the tolls charged by the City of Chicago beyond what is needed for the operation and maintenance of the Chicago Skyway would clearly constitute an unconstitutional burden under normal dormant Commerce Clause analysis. *Evansville Airport v. Delta Airlines*, 405 U.S. 707 (1972). Accord, *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994) (user fees measured by fair approximation of facility use, reasonableness of fee in relation to benefits conferred, and no discrimination against interstate commerce). By definition the portion of the tolls assessed beyond what is necessary for tollway upkeep is not a "fair approximation" of the use of the facilities by those benefitted by use of the Chicago Skyway and instead constitutes "fees excessive in relation to the

costs incurred by the taxing authorities." *Evansville Airport*, 405 U.S. at 717 & 719.

The attempt by the Seventh Circuit in this case to use *New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal District*, 875 F.2d 1018 (5th Cir. 1989) as a precedent for the applicability of the market participation exception falls short of the mark. In *Plaquemines* the parties had stipulated that the fees in that case were a reasonable charge for harbor services. *Id.* at 1020 ("The parties stipulate that the fees are reasonable."). That is scarcely true in this case. The core of this case is the unreasonableness of the Skyway tolls that, to the extent challenged, bear no relationship whatsoever to the cost of the Chicago Skyway Tollbridge System.

Rather than a constitutional user fee under the market participation exception to the dormant Commerce Clause, the substantial portion of the tolls which were and are being used for non-tollway purposes constitutes an unconstitutional "disguised revenue raising measure" extracted by the predominant economic and geographical leverage of the City of Chicago over Chicago Skyway users. See *Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340, 1345 (9th Cir. 1984), *aff'd by an equally divided* Court, 471 U.S. 81 (1985). That part of the tolls, which have been diverted to non-tollway purposes, are classifiable as masked "taxes" which are a "primeval governmental activity" outside the proprietary scope of the market participation doctrine. *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988). Although sovereign regulatory activity has thus far typically been used to negate the market participation exception, state taxation is certainly the twin pillar of state sovereignty. Even if not

technically a tax, a malapportioned user fee on interstate commerce is the dysfunctional equivalent of an improper tax under dormant Commerce Clause analysis in its effect on interstate commerce and thus should be considered outside the scope of the market participation defense.

The Court of Appeals decision in this case places the Seventh Circuit in principled conflict with the Ninth Circuit decisions of *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987) and *Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984). See also *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173, 1177 n.3 (9th Cir. 1992) ("The Ninth Circuit has considered the 'market participant' exception four times and rejected it each time."). The conflict goes beyond the Seventh and Ninth Circuits. Compare *Western Oil and Gas Ass'n v. Cory*, 726 F.2d at 1343 ("There is no other competitor to which they can go for the rental of the required strip of California coastline.") with *Lefrancois v. State of Rhode Island*, 669 F.Supp. 1204, 1212 (D.R.I. 1987) (refusal to craft a "monopoly" exception to the market participation doctrine). The *Cory* decision held that so-called "rent" charged by the State of California for pipelines running over tidal and submerged lands owned by the State did not protect California against a Commerce Clause violation because of a claim that the "rent" was within the market participation exception. The appellate court in *Cory* found that the market participant exception did not apply because the "rent," based as it was, on the volume of petroleum gushing through the pipelines, bore no reasonable relationship to the costs of benefits provided by the State of California. *Cory*, 726 F.2d at 1344.

In *Shell Oil* the Ninth Circuit emphasized that when the City of Santa Monica proposed a "franchise fee" agreement with Shell Oil Company for a pipeline running under city streets the market participation doctrine did not apply because "restrictions on publicly controlled transportation corridors raise the dormant commerce clause concern for impediments to the free flow of commerce." *Shell Oil Co.*, 830 F.2d at 1057. Mere contractual privity under the franchise agreements, past and present, did not make Santa Monica a market participant. This was so even though Santa Monica negotiated independently with Shell Oil Company, just like a private landowner who might have sold an easement to Shell Oil Company, rather than in the city's capacity of a "paradigm market regulator" who could have instead adopted an ordinance regulating oil pipelines within the city. *Shell Oil Co.*, 830 F.2d at 1056. Even though some private market alternatives also existed for the Western Oil & Gas Association and the Shell Oil Company, they were not enough to offset the realistic governmental dominance in the *Cory* and *Santa Monica* cases and thus not enough to allow use of the market participation defense to a violation of the dormant Commerce Clause. Likewise, in the case at bar, the City of Chicago has unreasonably used its dominant economic and geographical leverage, even if not monopoly power in an absolute sense, to impede the flow of interstate commerce through a major transportation artery for the sake of its own parochial gain.

Even if there were not a conflict between this Seventh Circuit decision and the above-mentioned Ninth Circuit decisions, a question, important but yet unresolved by

this Court, is the exact status of "hybrid" governmental activities, which implicate both a governmental and a proprietary activity, in the determination of the market participation exception. Even though the legal assessment of tolls within federal statutory limits might be classified as "proprietary" and akin to a rental fee in the private market, the fact remains that the construction and operation of highways have traditionally been viewed as a quintessential "governmental" activity as far back as the ancient roads of Rome. In another context, the Illinois Supreme Court has perhaps stated the obvious by observing that the construction and maintenance of roads and bridges within the state, whether toll or free, is a "governmental" function. *People ex rel. Hoagland v. Streeper*, 12 Ill.2d 204, 212, 145 N.E.2d 625, 629 (1957). But, even beyond this, a substantial sum of tolls, amortizing $52 million in debt, is being charged to Chicago Skyway users in violation of the statute of the federal sovereign, used to fund pet projects unrelated to the maintenance of the Chicago Skyway, and is surely not a "proprietary" function. See III, below. The City of Chicago arguably has no more "proprietary" power to assess excessive tolls beyond limits set by a federal statute than a landlord in the private market would have to charge rents in excess of rent-control laws. The private market analogy assumes the marketeer is acting within the law.

Several cases have noted the hybrid nature of a traditional governmental activity tied to what purports to be a proprietary "fee" or "rent." See, for example, *New Orleans Steamship Ass'n v. Plaquemines Port, Harbor, and Terminal District*, 874 F.2d 1018, 1021 (5th Cir. 1989) ("Plaquemines's fees wear the colors of both market reg-

ulation and market participation.") and *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987) ("This case falls somewhere between the paradigm examples of market regulator and market participant."). A doctrine which allows a lower court to determine a result by too easily characterizing an activity as "governmental" or "proprietary" runs the risk of a rudderless and overly conceptualized jurisprudence. A hybrid activity could be interpreted to invite a court to sever a unified and interdependent economic reality into isolated parts labeled either "proprietary" or "governmental," depending on a court's pre-chosen perspective. See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 717 (6th Cir. 2000) (Clay, J., concurring) ("I would not attempt to truncate the analysis with regard to the segments of the local waste disposal process, as does the majority opinion, inasmuch as the County awarded a single monopoly to Monarch with respect to all aspects of the waste disposal business in Warren County.").

The opinion of the Seventh Circuit in this case attempted to short-circuit an analysis of the questionable extension of the market participation doctrine by noting in passing, while still proceeding to discuss the merits of Plaintiffs' objection, that Plaintiffs pleaded themselves out of court as to the market participation doctrine involved in the Commerce Clause claim of Count III because they admitted in the Sherman Act claim of Count II, 15 U.S.C. 1 & 2, that "the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity." (App. *infra*, A-14 & App. *infra*, B-16). It suffices, however, that the Federal Rules of Civil Procedure permit the separate statement of claims re-

gardless of consistency. Fed.R.Civ.P. 8(e)(2). A court may not construe a claim as an admission against another alternative or inconsistent claim. See, for example, *Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority*, 103 F.3d 1165, 1175 (3d Cir. 1997) ("The Rule permits inconsistency in both legal and factual allegations.") The counts in a complaint should be examined independently. *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir. 1985). This is all the more so in a civil rights case. *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 95 (2d Cir. 1994) ("[P]laintiff may plead two or more statements of a claim, even within the same count, regardless of consistency.").

That Plaintiffs alleged an alternative theory of "proprietary enterprise" to avoid the state action exception of the Sherman Act when a municipality is involved does not constitute a conclusive judicial admission in the Commerce Clause claim that the market participation defense applies. Even if this were so, *arguendo*, the Defendant then also pleaded itself out of court by raising the state action defense to the Sherman Act in its brief and thus admitting for purposes of the Commerce Clause count that the tollway operation was a "governmental activity." (Deft. Brief at 32-39). Indeed, the doctrinal conundrums unleashed by the interaction of the market participation exception and the Sherman Act, as discussed *infra* under Point II, when a municipality is involved, provide an additional reason for the granting of a Writ of Certiorari in this case.

In sum, the line between a lawful proprietary market participation by a governmental entity and an unlawful governmental activity under the dormant Commerce

Clause has been called "a fuzzy one that has perplexed courts and commentators alike." *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173, 1178 (9th Cir. 1992). See also Michael J. Polelle, *A Critique of the Market Participation Exception*, 15 Whittier L. Rev. 647 (1994). The Supreme Court has shown a tendency not to expand the market participation exception. Rather it appears to have confined the exception to an activity focused on a single industry at a time instead of potentially broad application to undefined industries. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 593-94 (1997). Accord, *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 63 (1st Cir. 1999) ("[T]he market participation exception is a narrow one.") The question is: How narrow is the exception in light of hybrid activities such as those in the present case? The novel extension of the market participation defense to federally funded interstate highways has profound implications for the free flow of interstate travel on toll highways across this country. To what extent will the market participation doctrine be allowed to transform mayors of municipalities into medieval lords of the toll bridge who may exact what the interstate market will bear for the financial support of their private fiefdoms?

II. THE DISMISSAL OF PLAINTIFF'S ANTITRUST CLAIMS UNDER SECTIONS 1 AND 2 OF THE SHERMAN ACT NOT ONLY PREMATURELY ABORTED THE FACTUAL DEVELOPMENT OF KEY ANTITRUST ISSUES BUT ALSO LEFT UNEXPLORED THE OVERARCHING AND UNRESOLVED PARADOX OF THE RELATIONSHIP BETWEEN THE MARKET PARTICIPATION EXCEPTION AND THE SHERMAN ACT.

Beyond the narrow technicalities of pleading law, this case presents a prime opportunity for this Court to settle the uneasy and conflicting relationship between the older state action immunity doctrine of Sherman Act antitrust law and the more newly developed market participation exception to the dormant Commerce Clause when, as in this case, a municipality is sued under alternative theories based both on the Sherman Act and the dormant Commerce Clause. (App. *infra*, C8-11).

The state action immunity doctrine crafted by this Court in *Parker v. Brown*, 317 U.S. 341 (1943) immunizes a state from anti-competitive conduct engaged in by the state as an act of a sovereign government, while the market participation doctrine, first laid down in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), immunizes a state from the normal dormant Commerce Clause analysis when it enters a market in its proprietary capacity as an ordinary buyer or seller. Beyond this double-barreled advantage the lurking question that begs resolution by this Court is whether or to what extent a state, either directly or through its political subdivisions, which enters the market as an ordinary proprietor who buys and sells, may still shield itself behind the state action immunity defense from otherwise legitimate anti-

trust claims even though its competitor merchants in the market would not have such a defense and might be held liable for the same antitrust claims. This issue will demand increasing resolution by the Court as states and cities privatize their operations either directly or by contract. The Court has indicated that the definitive resolution of this issue remains open. "We reiterate that, with the possible market participation exception, *any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'"), *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991).

Despite the reservation of the question in *City of Columbia* some circuits have already assumed that a municipality participating as a market participant does not necessarily forego the state action immunity defense to an antitrust claim. The Eighth Circuit has not taken the hint and has instead referred to the Court's reservation of the issue in *City of Columbia* as "merely a suggestion" and "not a rule of law." *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312-1313 (8th Cir. 1991) (state action immunity applied to market participant municipality). In a more extended analysis the Second Circuit in *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, 155 F.3d 59, 79-81 (2d Cir. 1998) acknowledged that the private market playing field is not even when a state entity, which enters the market, is exempt from antitrust action under the state action defense whereas its private-person competitors would not be. But though apparently troubled by this inequality of law, the Second Circuit found that "state sovereignty" justified this legal discrepancy. But

this leads to what might be a legal Catch-22: a political subdivision of a state cannot be sued for violation of the dormant Commerce Clause when it enters the market because it is merely a "proprietor," like private proprietors, but when sued for violation of the antitrust laws like private proprietors it is protected by "state sovereignty" because with chameleon-like agility it is no longer a "proprietor" but "a sovereign." If the Second Circuit is correct, then it surely must take this Court to say so on an issue of such national importance.

The resolution of this puzzling issue is especially appropriate in a case, such as this, where the Seventh Circuit and District Court prevented the development of factual issues which would have fleshed out the potential conflict between antitrust law and the market participation doctrine by finding that the Complaint insufficiently alleged violations of the Sherman Act. Therefore, it was not necessary to reach the City's state action immunity defense. (App. *infra*, A-12). Count II, Paragraph 31, of Plaintiffs' Complaint alleges that the City's operation of the Chicago Skyway is "an unlawful violation of Title 15 United States Code, Secs. 1 and 2 in that the Skyway portion of Interstate Route 90 is an essential facility in interstate commerce which the City maintains as a monopoly and conditions access to the facility on the payment of an arbitrary and unreasonable fee, not reasonably related to the cost of the use of the facility." (App. *infra*, C-9).

It is axiomatic that the claim of monopoly under the Sherman Act, 15 U.S.C. § 2 requires two major allegations: (1) possession of monopoly power in a relevant market (2) the willful acquisition or maintenance of that

power as distinguished from normal structural growth or development. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992). Both elements are noted in Plaintiff's Count II. The Seventh Circuit, however, affirmed the dismissal of this antitrust claim, despite the rule that a federal court may not apply a "heightened pleading standard" in civil rights cases claiming municipal liability under 42 U.S.C. § 1983 beyond the usual requirements of Fed.R.Civ.P. 8(a). *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) (added specificity obtainable by amendment of Rules 8 & 9 but not by judicial interpretation).

By affirming the District Court dismissal, the Seventh Circuit foreclosed factual development of the case related to the monopoly power and anti-competitive behavior of the City. The Seventh Circuit, following the lead of the District Court, scotched Plaintiffs' monopoly claim by using the doctrine of judicial notice to circumvent factual development about the practicability of alternative routes to the Chicago Skyway. The courts below made questionable qualitative and quantitative assumptions about the alternative routes. (App. *infra*, A-11 & B-14). Although judicial notice may be used to mark the location of streets and highways or cities and countries, this doctrine should not extend to fact-laden questions relating to the nature and operation of highways in the complex context of antitrust litigation. See *Lowrence v. Pflueger*, 878 F.2d 1014, 1018 (7th Cir. 1989) (location of Kenosha, Wisconsin, in relation to Tennessee and Canada) cited by the District Court. (App. *infra*, B-14). The granting of Defendant's motion to dismiss, with prejudice, also prevented Plaintiffs from proving anti-competitive behavior under

the Sherman Act § 2. Even if the constant ratcheting-up of tolls is not in and of itself suggestive of an anti-competitive animus, the substantial profits reaped by a defendant, when considered with other circumstances, may be sufficient to constitute anti-competitive behavior. *United States v. General Electric Co.*, 82 F. Supp. 753, 895 (D.N.J. 1949). By not even allowing the case to proceed to the summary judgment stage, the Seventh Circuit and the District Court prevented what might have proved a fruitful investigation into City practices for the purpose of uncovering these "other circumstances."

Even if the allegations of the Complaint were *arguendo* insufficient to satisfy minimal pleading requirements for the Sherman Act §2, they are sufficient to allege a violation of the Sherman Act §1. Besides Paragraph 31 of County II, Paragraph 30 of the same count also alleges "an unlawful violation of Title 15 United States Code, Sec.1 and 2" in that the City "maintained a toll rate schedule that conditions access to the Chicago Skyway to the payment of monies used to finance City Transportation Improvements, and as such is a illegal tying agreement and a per se violation of the law." (App. *infra*, C-9*)*. The elements of a per se tying violation under the Sherman Act §1 are: (1)two separate products (2) a tie or conditioning of the sale of one product on the buying of the other (3) a sufficient economic power in the tying product (4) a substantial volume of commerce affected in the tied product market. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications*, 63 F.3d 1540, 1546 (10th Cir. 1995).

The allegations of the Complaint sufficiently meet the minimum standards for a tie-in claim. That a substantial volume of interstate commerce is involved in this case is obvious. Likewise, the level of economic power used to coerce is sufficiently stated in the Complaint because that power need not rise to the level of a "monopoly" under Sherman Act § 2. *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1353 (2d Cir. 1976). A contract between a buyer, such as the user of the Chicago Skyway, and a seller, such as the City of Chicago, can satisfy the concerted element of the Sherman Act §1 where the seller coerces a buyer's agreement by an imposed tying arrangement. *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137, 1142 (10th Cir. 1997). The most interesting question of the tie-in elements is whether this case involves two products. The two products could be seen as the use of the Chicago Skyway and the use of local streets and other facilities benefitted by the diversion of tollway proceeds. To use the Chicago Skyway a driver must pay part of the toll to support Chicago streets and facilities totally separate from the Chicago Skyway, whether or not the driver ever uses those Chicago streets or facilities. Whether components are really separate products is determined not by function but by the nature of consumer demand for them. *Multistate Legal Studies, Inc.*, 63 F.3d at 1547.

Although rare, and with arguments for and against, an unsettled issue in anti-trust law raised by this case is whether a claim exists for an uncommunicated tie-in. Even if users of the Chicago Skyway are unaware of the tie-in a cause of action might still exist. Phillip Areeda et al. 10 *Antitrust Law: An Analysis of Antitrust Principles*

and Their Application, sec. 1755(a), at 311-12 (Little Brown & Co. 1996). See also *United States v. American Can Co.*, 87 F.Supp. 18, 25-27 (N.D. Cal. 1949) (defendant's internal memo sufficient though tie-in clause technically deleted from contract). It is likely, however, that had this case been allowed to proceed Plaintiffs would have uncovered media publications and the public records of this municipal defendant which would have shown that at least some users of the Chicago Skyway were aware the Skyway was earning revenues beyond what was needed for Skyway maintenance and that the excess revenues were being siphoned off to non-tollway municipal purposes.

In sum, the intertwining of the antitrust issues, especially the state action immunity doctrine, with the market participation exception has caused a knotty problem of jurisprudence that only this Court can loosen.

III. SECTIONS 301 AND 129(A)(3) OF TITLE 23 OF THE UNITED STATES CODE, WHICH LIMIT TOLL CHARGES ON FEDERALLY FUNDED HIGHWAYS, ARE INTERLOCKING AND UNIFIED STATUTORY PROVISIONS FOR WHOSE VIOLATION 42 U.S.C. § 1983 PROVIDES A REMEDY INDEPENDENT OF ANY IMPLIED CAUSE OF ACTION UNDER *CORT v. ASH*, 444 U.S. 66 (1975), AND ITS PROGENY.

A conflict exists between the decision of the United States Court of Appeals for the Seventh Circuit in this case and *Clallam v. Department of Transportation*, 849 F.2d 424 (9th Cir. 1988). In *Clallam* class-action users of a newly reconstructed bridge, who relied on 42 U.S.C. § 1983, sued for a violation of 23 U.S.C. §129(a) and

§ 301, the Federal-Aid Highway Act, to prevent the State from collecting tolls to recover the amount of insurance proceeds which the State had paid to the Federal Highway Administration. The Ninth Circuit reversed a decision for the plaintiffs solely on the basis that the State was entitled to recover the amount of the insurance proceeds from the tolls because the insurance proceeds were to be considered "costs of construction" under the existing version of § 129. The appellate court in *Clallam* held that 42 U.S.C. § 1983 provided an express right of action to enforce § 301 and, therefore, the appellate court had no need to consider "whether 23 U.S.C. §§ 301 and 129(a)" provided an implied right of action. *Clallam*,849 F.2d at 427 n.4. The context of the decision and the discussion by the appellate court indicate that 23 U.S.C. §§ 301 and 129(a) are interlocking and unified statutory sections so that a remedy based on 42 U.S.C. § 1983 applies as much to § 129 as it does to § 301. Title 23 U.S.C. § 301 states the general rule prohibiting tolls, "[e]xcept as provided in section 129 of this title" and § 129(a)(3) in the current version of the statute states as an exception the right of a State to recoup the costs of operation and maintenance, but no more, through tolls. *See also* 23 U.S.C. §129(a)(1) ("Notwithstanding section 301 of this title and subject to the provisions of this section. . .").

The Seventh Circuit relegated *Clallam* to footnote 3 of its opinion and concluded that the Plaintiffs in this case could not use 42 U.S.C. § 1983 to enforce § 129(a)(3) of Title 23 U.S.C., even though § 129(a)(3) is the interlocking statutory companion to § 301 and even though the appellate court in *Clallam* discussed that interlocking

relationship. (App. *infra*, A-5). That 23 U.S.C. § 129(a)(3) is a limited exception to the general rule prohibiting tolls under § 301 does not logically preclude a remedy based on 42 U.S.C. § 1983 for a violation of § 129(a)(3). *Johnson v. City of Pleasanton*, 781 F.Supp. 632, 644 (N.D. Cal. 1991) ("The fact that the federal interest is an 'exception' rather than statutorily phrased as a benefit will not defeat its establishing a right or 'immunity' under section 1983."). The Seventh Circuit appears to have concluded that a §1983 civil rights action may lie against the exaction of any toll, where the entire toll is illegally levied, but not for the exaction of the illegal portion of an otherwise legal toll. But this would lead to the anomaly that §1983 could only be used to enforce absolute statutory prohibitions but never exceptions or limitations contained in federal statutes. The federal interest in assuring the passage of interstate goods and travelers unburdened by any tolls or unburdened by tolls beyond a certain limit is functionally the same.

The core of the Seventh Circuit's reasoning is apparently its adoption of the District Court's position that "[t]here is no compelling reason why private persons such as plaintiffs . . . should have the right to seek federal court action to aid in the enforcement of this statute." (App. *infra*, A-5) But the inference that plaintiffs may have the burden of showing a "compelling reason" to succeed under §1983 inverts Supreme Court precedent. In reviewing these precedents this Court, to the contrary, has stated: "Under these cases if there is a state deprivation of a "right" secured by a federal statute, §1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific

evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987). Section 1983 provides a remedy for a violation of federal statutory rights unless Congress has affirmatively withdrawn it. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 509 n.9 (1990). Congress has not done that in this case.

The Seventh Circuit went even further by citing *Blessing v. Freestone*, 520 U.S. 329 (1997) for the proposition that 23 U.S.C. §129(a)(3) contains "no judicial, or even administrative, remedy through which aggrieved persons can seek redress." (App. *infra*, A-8) Curiously, the Seventh Circuit appears to suggest that the lack of an administrative remedy, instead of its presence, is what forecloses a § 1983 claim. However, even if some other remedy did exist *arguendo* for a violation of § 129(a)(3), this Court in *Blessing* noted that only twice had it found a remedial scheme sufficiently explicit to foreclose a §1983 action. *Id.* at 347. In the case at bar nothing in Title 23 creates the same kind of explicit private right of action that would reveal a Congressional intent to automatically preclude a §1983 action. This Court in *Blessing* further emphasized that "a plaintiff's ability to invoke §1983 cannot be defeated by '[t]he availability of administrative mechanisms to protect the plaintiff's interests'[citation omitted]." *Id.* at 347. Accord, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 523 (1990). The Supreme Court in *Blessing*, unlike the Seventh Circuit in this case, did not automatically foreclose any right under Title VI-D of the Social Security Act but rather decided the case before it should be remanded for

further proceedings to determine what specific rights might have been violated under Title V-D.

Besides its specific points of conflict with *Clallam*, the decision of the Seventh Circuit in this case raises an important issue of federal law that should be settled by this Court. Like other federal circuits, the Seventh Circuit may have confused and been confused by the separately developed concepts of a private cause of action implied from a particular statute, as established in *Cort v. Ash*, 422 U.S. 66 (1975), and a private cause of action under 42 U.S.C. § 1983 for a deprivation of a right, privilege, or immunity based purely on federal statutory law, as established in *Maine v. Thiboutot*, 448 U.S. 1 (1980). Much of the reasoning of the Seventh Circuit rests on the "four-part test established by Cort v. Ash. . .". (App. *infra*, A-6). One of the cases cited by the Seventh Circuit, for example, *Statland v. American Airlines, Inc.*, is not even a § 1983 decision but a decision solely concerned with an implied non-§ 1983 private right of action.

The four-part test of *Cort v. Ash*, 422 U.S. 66, 78 (1975) for the determination of a non-§ 1983 implied statutory cause of action asks whether: (1)the plaintiff belongs to a class for whose special benefit the statute was enacted (2)the legislative intent indicates a desire to create such a remedy (3)such a remedy would be consistent with the underlying purposes of the legislative scheme (4)the cause of action is traditionally left to state law so that it would be inappropriate to infer an action based solely on federal law. Accord, *Thompson v. Thompson*, 484 U.S. 174, 179 (1987) ("Our focus on legislative intent does not mean that we require evidence that Members of Con-

gress, in enacting the statute, had in mind the creation of a private cause of action.").

In *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 508-09 (1990) this Court created a separate test for a § 1983 action based on violation of a federal statute. Such a §1983 action exists unless: (1) the statute does not create an enforceable right, privilege, or immunity (2) or, Congress has acted to foreclose the enforcement of the federal statute in the language of the statute itself. The determination of (1) depends on three subfactors: (a) whether the statutory provision was intended to benefit the putative plaintiff (b) and if so, whether the provision merely establishes a congressional preference instead of a binding obligation on a governmental unit (c) and whether the claimed plaintiff's interest is so vague and amorphous that it is outside the capability of the judiciary to enforce it. Despite Justice Blackmun's dissent in *Suter v. Artist M.*, 503 U.S. 347 (1992), the consensus of the federal appellate circuits appears to be that *Suter* did not overrule *Wilder* and is in fact consistent with that decision. *Wood v. Tompkins*, 33 F.3d 600, 606 (6th Cir. 1994).

It is important that this Court explicitly separated the two private-action tests not only on the factors used but, more importantly, on policy grounds. The four-part *Cort* test reflects a cautious concern based on a respect for the separation of powers that enables Congress to control the availability of *statutory* remedies rather than remedies available through the courts which are developers of the common law. But a § 1983 claim can be interpreted more expansively precisely because the separation of powers is not an issue inasmuch as Congress is the statutory

source of both §1983 and the particular federal statute alleged to have been violated. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. at 509 n.9 (1990).

Despite the apparent separateness of the analytic and policy tracks plotted out by the Supreme Court for these two private causes of action, the federal circuits, like the Seventh Circuit in this case, have sometimes interpolated *Cort* factors or analysis into a §1983 claim, to the detriment of the §1983 claim. One approach, illustrated by the Eighth and Fourth Circuits, is to conclude that the "threshold factors" are the same for both tests. *Four T's, Inc. v. Little Rock Municipal Airport Commission*, 108 F.3d 909, 916 (8th Cir. 1997). Accord, *Doe v. Broderick*, 225 F.3d 440, 448 (4th Cir. 2000) ("These inquiries overlap, however."). Michael A. Mazzuchi, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 Mich. L. Rev. 1062, 1118 (1992) (Thus, the implied right of action and section 1983 tests should be the same."). Yet, the Second Circuit in *Chan v. City of New York*, 1 F.3d 96 (2d Cir. 1993) has apparently disagreed: "In *Wilder* the Supreme Court applied a three-part analysis, which is different from the *Cort v. Ash* analysis . . ." *Chan*, 1 F.3d at 103. One court even seems to have abdicated any choice by applying both tests without indicating which of the two was the correct one. *Johnson v. City of Pleasanton*, 781 F.Supp. 632 (N.D. Cal. 1991).

In passing, it should be briefly noted the lack of an explicit reference to 42 U.S.C. §1983 in Count I is of no consequence because where both parties argued a legal theory in their briefs and motions and neither the District Court nor the Seventh Circuit used the waiver doctrine but instead reached the merits of the case, the

Complaint has been constructively amended to technically include § 1983. See *Whitaker v. T.J. Snow Co.*, 151 F.3d 661, 663 (7th Cir. 1998). Defendant argued extensively in its Reply Brief below that § 1983 did not state a claim under § 129(a)(3) and that none could be implied from § 129(a)(3). Deft.'s Reply Brief, *passim*, at 22-25. This, if anything, supports the confusion felt by attorneys and courts alike about the relationship between § 1983 and the *Cort* factors. Plaintiffs' Memorandum in Response to Motion to Dismiss, at 5 n. 5 ("If this Court deems it necessary, Plaintiffs will amend their Complaint to add Sec. 1983 allegations."). The District Court apparently never deemed it necessary.

The growing confusion among federal circuits about whether or to what extent the *Cort* factors apply to a § 1983 claim based on violation of a federal statute is important enough to merit the attention of this Court, especially since at least one of its Justices has stated that the Supreme Court should "get out of the business of implied private rights of action altogether." *Thompson v. Thompson*, 484 U.S. 174, 192 (1987) (Scalia, J., concurring in the judgment.").

CONCLUSION

Based on the conflict between the Court of Appeals' decision in this case and decisions of this Court and other United States Courts of Appeals, this Court is requested to exercise its discretion to hear this case. By doing so this Court will instruct the bench and bar on important issues, 1) concerning the breadth of the market participant doctrine, 2) concerning the relationship between the

state action immunity doctrine of antitrust law and the market participation exception, and 3) concerning the standards for causes of action under federal statutes, whether based on 42 U.S.C. § 1983 or implied.

Respectfully submitted,

MICHAEL J. POLELLE
Counsel of Record
JOHN MARSHALL
LAW SCHOOL
315 S. Plymouth Court
Chicago, IL 60604
(312) 987-1440

Of Counsel:

JAMES G. MEYER
IALONGO & MEYER
33 N. Dearborn Street
Suite 1300
Chicago, IL 60602
(312) 332-4701

LEE J. SCHWARTZ
30 N. LaSalle Street
Suite 2900
Chicago, IL 60602
(312) 553-5050

Attorneys for Petitioners

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 99-2859

ROY L. ENDSLEY III and STEPHEN GRAHAM, Individually and on Behalf of Those Similarly Situated,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 8094—**William T. Hart**, *Judge*.

ARGUED APRIL 20, 2000—DECIDED OCTOBER 12, 2000

Before MANION, ROVNER, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Plaintiffs challenge the City of Chicago's use of tolls collected on the Chicago Skyway to pay for some of the City's non-Skyway related transportation improvements. In 1995, the Skyway began producing revenue that exceeded its operating expenses. Prior to that time, the City used Skyway tolls exclusively to operate and maintain the Skyway. In 1996, the City decided to refinance outstanding Skyway debt and raise additional revenues for non-Skyway expenses through a new bond issue ("Series 1996 Bond Issue"). Plaintiffs seek to prevent use of Skyway revenues to pay for non-Skyway expenses and challenge the City's action on four separate grounds:

(1) violation of federal transportation statutes; (2) violation of antitrust laws; (3) violation of the Constitution's dormant Commerce Clause; and (4) violation of various state laws. The district court dismissed plaintiffs' complaint in its entirety for failure to state a claim. Because we find that the City's use of Skyway revenue for non-Skyway projects does not amount to a constitutional violation of any sort, we affirm.

I

Roy Endsley and Stephen Graham are users of the Chicago Skyway toll bridge, a 7.8 mile long high-speed, limited access highway that joins the Indiana Tollway with the rest of Interstate 90 at the Illinois-Indiana border. The Skyway is one of two Interstate routes that connect Chicago's Dan Ryan Expressway (Interstate 90/94) to the Indiana Tollway. The other is the Borman/Kingery/Bishop Ford Expressway (Interstate 80/94). When the Skyway was constructed in the late 1950s, it was paid for with private funds raised from the sale of revenue bonds in 1955 and 1957. Under the terms of the sale, the bonds were to be repaid solely from available Skyway toll revenues and the City itself was not obligated to repay the bonds.

The revenue raised by the Skyway tolls is heavily dependent on traffic volume. When traffic on the Skyway is heavy, more drivers pay the toll and more revenue is generated. Conversely, when traffic is low, the Skyway produces less revenue. On several occasions prior to 1996 (fourteen times), the City has raised the toll rates in order to pay the Skyway's maintenance and operating costs and to make the Skyway "a self-sufficient enterprise."[1] As a result, the current toll rate schedule ($2.00 or 25.6 cents

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[1] Oftentimes, the toll rates were increased pursuant to a federal court order which came out of a lawsuit brought by bondholders against the City.

per mile for most automobiles) is higher than the rate for other highways in the area.

Over the last ten years, the Skyway has enjoyed an increase in available funds. In 1991, the Skyway received $14.2 million in federal funds. In 1994, the City refunded the aggregate principal of outstanding Skyway revenue bonds by selling new ones. And in 1995, traffic volume on the Skyway increased significantly such that net revenues were projected to be $11.5 to $17.1 million annually through the year 2000. In 1996, the City sold Skyway bonds again ("1996 Bond Sale") and proceeds of the sale were sufficient to repay the outstanding aggregate principal amount of the 1994 bonds and the related refinancing costs. The excess $52 million raised was used to fund other City transportation improvements. As with past bond sales, the 1996 bonds are to be repaid solely from revenues the Skyway generates through tolls and concessions. At no time prior to 1996 did the City use Skyway revenue for purposes other than the maintenance and operation of the Skyway.

Endsley and Graham brought a class action suit against the City challenging its use of the $52 million raised by the 1996 Bond Sale for non-Skyway improvements. The City filed a motion to dismiss the action which the district judge granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Endsley and Graham now appeal. We review the district court's decision to grant a motion to dismiss *de novo*. *See Hentosh v. Finch Univ. of Health Sciences*, 167 F.3d 1170 (7th Cir. 1999).

II

On appeal, plaintiffs maintain that the City's use of proceeds from the 1996 Bond Sale for non-Skyway improvements violated various federal transportation statutes, antitrust laws, and the Commerce Clause of the Constitution. We consider each challenge in turn.

A. Federal Transportation Statutes

Plaintiffs contend that the City has violated two federal transportation statutes, 23 U.S.C. § 301 and 23 U.S.C. § 129(a)(3)[2] which when read together, regulate the entities operating tollways and receiving federal funds. Section 301 generally prohibits state and local entities from charging tolls on highways that receive federal funding. Section 129 creates an exception to that rule, allowing operation of tollroads only under certain conditions. Endsley and Graham argue that the City's failure to meet the conditions required under § 129 gives rise to a private right of action. It is clear that the City has not violated § 301. However, plaintiffs insist that the City has violated § 129 and they try to liken the language of § 301, which at least one court has found does create a private right of

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[2] 29 U.S.C. § 301 reads, "Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds."

29 U.S.C. § 129(a)(3) reads:

> Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department) having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the tolled facility is being adequately maintained, the State may use any toll revenues in excess of amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title.

action,[3] to that of § 129(a)(3), which on its face does not. The district court distinguished § 301 from § 129(a)(3) and rejected this approach. "If the City has violated § 129, any violation may be properly redressed by the Secretary of Transportation. . . . There is no compelling reason why private persons such as plaintiffs . . . should have the right to seek federal court action to aid in enforcement of this portion of the statute." The district judge's analysis is right on point. No express or implied private right of action was created by § 129. Neither a review of the language nor a consideration of the statute's intended beneficiaries, its legislative history, or the purpose of the statutory scheme suggest that it was. *See Cort v. Ash*, 422 U.S. 66, 78 (1975).

Nothing in the express language of the statute suggests that § 129(a)(3) creates a private right of action. Section 129 simply requires the Transportation Secretary and the tollway operating entity (here, the City) to enter into an agreement which sets forth a list of priorities for the spending of toll revenues by entities receiving federal funding under the statute. Under such an agreement, the City would be required to use toll revenues first for debt service, then for reasonable return on private investment in the project, then for any maintenance and operation costs. Therefore, the City's use of funds for non-Tollway expenses before fulfilling these other obligations would violate the agreement between the City and the Secretary of Transportation, not § 129.

Furthermore, a close review of the language, structure, and history of § 129 suggests that no implied private right

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[3] In *Clallam County v. Washington*, the Ninth Circuit held that § 301 provides the predicate right giving rise to a § 1983 action, because while Congress neither created nor prohibited an express remedy under Title 23, § 301 (mandating toll-free bridges) was intended to aid bridge users, by providing free access across waterways. Therefore, the plaintiffs were members of a class granted enforceable rights. 849 F.2d 424, 429 (9th Cir. 1988).

of action exists either. As we acknowledged in *Mallett v. Wisconsin Division of Vocational Rehabilitation*, 130 F.3d 1245, 1248-49 (7th Cir. 1997), the Supreme Court has retreated from the four-part test established in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether an implied cause of action exists under a statute.[4] *See also, Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."). Instead of applying the four-part test, we now focus primarily on legislative intent. "Our inquiry is whether Congress intended an implied right of action . . . in light of the statute's language, structure, and legislative history. If such inferences of intent are not present, we must conclude that the essential predicate for implication of a private remedy does not exist." *Mallett*, 130 F.3d at 1249 (internal citations omitted).

As we noted above, neither the language nor the structure of § 129 indicate that Congress intended to create a private right of action. A look at the legislative history suggests the same. Section 129 was created to authorize federal participation in, and funding for, the creation and maintenance of highways that facilitate travel among various states and cities.[5] It is by and large an appropria-

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[4] Under *Cort*, to determine if Congress intended to create a private right of action, the court would consider: 1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; 2) whether there is any indication of legislative intent to create or deny such a remedy; 3) whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and 4) whether the cause of action is one traditionally relegated to the states so that it would be inappropriate to infer a federal remedy. *Cort*, 422 U.S. at 78.

[5] Generally, the Intermodal Surface Transportation Efficiency Act of 1991 Pub. L. 102-240, 105 Stat. 1914, was established "to develop a national intermodal surface transportation system, to authorize funds for construction of highways, for highway safety

(continued...)

tions provision designed to "strengthen the highway and transit components of a national intermodal transportation" by contributing $153.5 billion in federal funds. *See* H.R. Rep. 102-171, at 10 (1991), *reprinted in* 1991 U.S.S.C.A.N. 1526. It is important to note that in enacting § 129, one of Congress' goals was to give state and local authorities more flexibility in spending federal highway funds. "The Committee feels that one of the most important things this legislation can do is give state and local officials the flexibility to make the crucial decisions on how their funds should be used. [Under § 129,] [t]hey will have the ability to choose the best transportation solution without the artificial constraints of funding categories." *Id.*

The provision upon which plaintiffs rely, § 129(a)(3), regulates the manner in which the entities operating federally funded tollways spend the revenues raised by the tolls charged. However, it does not operate to control state and local government use of tollway revenues completely. In fact, the legislative history indicates that Congress sought to encourage private investment in the nation's highways and public investment in privately operated toll roads such as the Skyway and give state and local entities more freedom to raise and use revenues as they see fit—just within certain limits.[6] Although willing to permit these innovative partnerships to form through the use of federal funds on privately-owned toll roads, Congress enacted § 129(a)(3) to strike a balance among the private and public interests involved in the operation of tollways

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[5] (...continued)
programs, and for mass transit programs, and for other purposes." (codified as amended at 23 U.S.C. § 129 (2000)).

[6] "The public-private partnership is important and should be encouraged. From the Federal perspective, one of the ways to approach infrastructure improvement would be to ease unnecessary Federal constraints preventing the mixing of Federal dollars with private funds on projects." *Id.* at 27.

like the Skyway. The provision simply sets forth limitations on the use of revenues for those highways that receive funding from the U.S. Department of Transportation under the statute. The existence of these limitations do not lead us to the conclusion, however, that Congress intended to open the door to private enforcement of them.

As in other cases where the Supreme Court has found no implied right of private action, § 129 contains no judicial, or even administrative, remedy through which aggrieved persons can seek redress. *See Blessing v. Freestone*, 520 U.S. 329, 348 (1997) (holding that a Social Security Act provision contained no private remedy, either judicial or administrative, through which aggrieved persons could seek redress). Like many statutes appropriating federal funds and regulating the use of those funds, the only way § 129 assures that the City will abide by the statute's rules is through oversight by an executive agency official, here the Secretary of Transportation. Any violation of the provision's mandates will be handled by the Secretary of Transportation, not private citizens. It is as Congress intended it to be. A strong presumption exists against the creation of an implied private right of action and where, as here, there is nothing in the legislative history to suggest that such a right was intended, we will not imply a private right of action where none appears in the statute. *See Statland v. American Airlines, Inc.*, 998 F.2d 539, 540 (7th Cir. 1993) (quoting *West Allis Mem'l Hosp., Inc. v. Bowen*, 852 F.2d 251, 254 (7th Cir. 1988)).

Seeking to salvage their transportation statute claims, plaintiffs also challenge the district court's denial of their motion for leave to amend the complaint. The district court correctly denied this motion. For even if plaintiffs were to bring the § 129 claims by way of 42 U.S.C. § 1983, they would still lose. "Section 1983 is not available to enforce a violation of a federal statute where Congress has foreclosed enforcement in the enactment itself and 'where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter v. Artist*

M., 503 U.S. 347, 355-56 (1991), (citing *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987)). As such, the district judge did not err in denying plaintiffs' motion to amend.

B. Section 2 of the Sherman Act

Plaintiffs next seek relief under § 2 of the Sherman Act.[7] The district court held that plaintiffs failed to plead sufficient facts to show the City possessed monopoly power as required under the Act. Section 2 forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626c, at 76 (1978). "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 481 (1992) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). In support of their argument, plaintiffs assert that the Skyway is the "only high-speed limited access route connecting the Dan Ryan expressway in Chicago to the Indiana Tollway." To satisfy the second element, plaintiffs maintain that by charging an arbitrary and unreasonable toll which brings in revenue exceeding the cost of operating the Skyway, the City is engaging in anti-competitive conduct.

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[7] 15 U.S.C. § 2 provides in pertinent part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." Originally, plaintiffs sought relief pursuant to § 1 of the Sherman Act as well. However, as they fail to raise any argument concerning § 1 in their briefs, we will address their § 2 claim only.

As a preliminary matter, plaintiffs argue that the district judge erred in taking up the question of market power on a motion to dismiss. He did not. We acknowledge that frequently, questions of whether the defendant possessed the requisite market power to establish a monopoly are addressed in a motion for summary judgment or trial. *See State of Ill. v. Panhandle E. Pipe Line Co. Med. Ctr.*, 935 F.2d 1469, 1472 (7th Cir. 1991); *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1557 (7th Cir. 1990). However, where plaintiffs fail to identify any facts from which the court can "infer that defendants had sufficient market power to have been able to create a monopoly," their § 2 claim may be properly dismissed. *Hennessy Indus. Inc. v. FMC Corp.*, 779 F.2d 402, 405 (7th Cir. 1985). *See also*, *BCB Anesthesia Care v. Passavant Mem'l Area Hosp. Ass'n*, 36 F.3d 664, 668 (7th Cir. 1994) (affirming dismissal of a Sherman Act claim on a motion to dismiss, noting, "sometimes the conclusion follows a motion to dismiss; more often the decision is one of summary judgment, but often it appears that the record relied upon [in rejecting plaintiff's antitrust claim] is the absence of facts indicating special circumstances raising antitrust concerns").

Here, plaintiffs' complaint does not contain facts allowing an inference that the City has monopoly power. It is true that *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), bars the district court from applying a heightened pleading standard in antitrust cases. *See MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995). However, to survive a motion to dismiss, plaintiffs still must set forth facts sufficient to create an inference that defendant had enough market power to create a monopoly. *See Hennessy*, 779 F.2d at 405. The facts do not suggest that the City has monopoly power in the relevant market (high-speed limited access routes connecting Chicago to Indiana). At least two alternate routes, the Borman/Kingery/Bishop Ford Expressway and the Tri-State Tollway, "compete" with the Skyway. While the Skyway

may be the more desirable route, it is not the only high-speed roadway between Chicago and the Indiana Tollway. If the Skyway tolls become too high, drivers will take one of the alternate routes. The availability of these very viable options for a high-speed access route linking Chicago to Indiana indicates that the City does not have monopoly power over the relevant market.

Even if it could be said that the City possessed monopoly power, plaintiffs have not presented sufficient facts to meet the second requirement under § 2, anti-competitive behavior or abuse of market power. The mere existence of the power to control prices or exclude competition is not unlawful unless it is coupled with intent. *See United States v. Griffith*, 334 U.S. 100, 107 (1948), disapproved on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). By intent, we do not mean intent to obtain a monopoly or to capture an ongoing increase in market share. This of course is the aim of every business endeavor. Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anti-competitive means. As such, the Sherman Act does not prohibit an entity possessing market power from simply raising prices in order to increase revenues. For a § 2 violation, more is needed. *See U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 612 (1977).

The City's decision to raise the cost of Skyway tolls and raise additional revenue for other transportation projects is not, in and of itself, anti-competitive. To the contrary, we have recognized that "[v]irtually all business behavior is designed to enable firms to raise their prices above the level that would exist in a perfectly competitive market." *Panhandle E. Pipe Line*, 935 F.2d at 1481. In fact, we have noted that when an entity raises prices, competition is enhanced and therefore, in some cases, anti-trust claims are precluded. *See O.K. Sand & Gravel, Inc. v. Martin Marietta Technologies, Inc.*, 36 F.3d 565, 573 (7th Cir. 1994) (citations omitted). While a consumer may suffer

anti-trust injury when higher prices result from some unlawful monopolistic conduct, in this case, plaintiffs have not identified such conduct.[8] Plaintiffs plead facts showing the City using anti-competitive behavior neither in their alleged attempt to gain monopoly power (such as forming a conspiracy or an unlawful combination), nor in their alleged attempt to maintain it (such as tying Skyway use to another product).[9] They cite only the higher Skyway tolls, or the "overcharge" as they label the increased tolls, as evidence of unlawful anti-competitive behavior. Plaintiffs have failed to identify any facts which point to the City's alleged anti-competitive use of its power to control the price of the Skyway tolls. Therefore, we conclude that the district court did not err in dismissing plaintiffs' anti-trust claim.[10]

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[8] *See O.K. Sand & Gravel*, 36 F.3d at 573 ("if . . . [plaintiff] were arguing that it was injured as a consumer, higher prices in output due to an unlawful combination would be the 'type' of injury the antitrust laws intend to prevent").

[9] On appeal, plaintiffs rely solely on their assertion that the City abused its market power by raising the Skyway tolls and using revenues for non-Tollway expenses. They do not revisit their argument that the City has engaged in an unlawful tying arrangement by conditioning access to the Skyway on payment of money to fund non-Skyway transportation improvements. Even if they did, a review of the law and common sense suggests that this argument also fails. "A tying arrangement cannot exist unless two separate product markets have been linked." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 20-21 (1984). Drivers who pay Skyway tolls are not purchasing a separate product that is somehow linked to the Skyway. The non-Skyway transportation improvements involve streets and roads throughout the city that drivers use for free.

[10] As we have found that plaintiffs cannot meet the requirements to show a § 2 Sherman Act violation, we need not reach the City's state action immunity defense.

C. Commerce Clause

Finally, plaintiffs assert that because the Skyway financing scheme and the tolls charged are not apportioned to the use or cost of operating the Skyway, the City has unreasonably burdened interstate commerce and violated the Constitution's dormant Commerce Clause. The Commerce Clause is an affirmative grant of power to Congress. U.S. Const. art. I, § 8, cl. 3. Where Congress has not exercised its powers under the Commerce Clause, states generally are free to legislate over that area unless or until Congress decides to take action. The Supreme Court has read the Commerce Clause to create not only affirmative powers to legislate, but also a negative implication that limits state action as well. *See Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945); *Gibbons v. Ogden,* U.S. (9. Wheat) 1, 199-200 (1824). As a result, the dormant Commerce Clause is invoked to scrutinize state regulations that burden interstate commerce, even in the absence of conflicting congressional legislation.

Under dormant Commerce Clause precedent, "a levy is reasonable . . . if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 369 (1993). Rather than argue that its Skyway tolls meet this test, in its defense the City asserts that since it acts as a proprietary enterprise in its operation of the Skyway, its decision to raise the Skyway tolls and use revenue for non-Skyway expenses is protected by the market participant doctrine. The market participant doctrine "differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988).

Therefore, the question before us is whether in operating the Skyway, the City was acting as a participant or regulator of the local highway system. Here, plaintiffs sealed their own fate by including in their complaint the following: "Since its inception, the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity." We have long held that a plaintiff may plead himself out of court by including factual allegations which, if true, show that his legal rights were not invaded. *See Stewart v. RCA Corp.*, 790 F.2d 624, 632 (7th Cir. 1986), *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7th Cir. 1986). In affirmatively stating that the City runs the Skyway as a proprietary enterprise, plaintiffs fatally injure their Commerce Clause claim.

Even if plaintiffs had not plead themselves out of court, the facts suggest that the City was indeed a market participant. "The market-participant doctrine permits a State to influence a discrete, identifiable class of economic activity in which it is a major participant." *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 97 (1984) (internal citations omitted). Courts have recognized the operation of private toll roads as legitimate economic activity. *See Overstreet v. North Shore Corp.*, 318 U.S. 125, 127 (1943); *Lane Construction Corp. v. Highlands Ins. Co., et al.*, 207 F.3d 718, 720 (4th Cir. 2000). The City sold revenue bonds to pay for construction of the Skyway and funds Skyway maintenance and operation by charging drivers a toll. As owner and operator of the property, the City offers drivers access to the Skyway in exchange for a fee. At times, when the Skyway was not raising sufficient revenue, the City would fund debt service and maintenance costs. These facts suggest that the City was acting as a property owner, using its property to raise money, not as a regulator.

Plaintiffs contend that while the City may be acting as a market participant, at the same time, by levying a toll on the Skyway, it is acting (in a hybrid role) as a market regulator. Courts interpreting the Commerce Clause have long struggled to draw the line between that which is con-

sidered a government function or regulatory activity and that which is considered proprietary activity. *See Garcia v. San Antonio Metropolitan Transit Auth.* 469 U.S. 528, 545 (1985) ("the goal of identifying 'uniquely' governmental functions, for example, has been rejected by the Court . . . in part because the notion of a 'uniquely' governmental function is unmanageable."); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (attempting to define the scope of governmental functions protected from federal regulation under the Commerce Clause), overruled by *Garcia*, 469 U.S. at 557; *New York v. United States*, 326 U.S. 572, 584 (1946) (concluding that the distinction between 'governmental' and 'proprietary' functions was 'untenable' and that it had to be abandoned). However, in determining whether the market participant doctrine applies, we have remained loyal to this cumbersome, yet necessary dichotomy. *E. & E. Hauling v. Forest Preserve Dist. of DuPage County, Ill.*, 821 F.2d 433, 438 (7th Cir. 1987) (finding that the Forest Preserve acted as regulator not a market participant); *W.C.W. Window Co. v. Bernardi*, 730 F.2d 486, 494 (7th Cir. 1984) (citing *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204 (1983)). Where, as here, the facts and circumstances suggest that a government entity is acting as a market participant rather than a market regulator, the doctrine will apply and that entity will not be subjected to the limitations provided by the dormant Commerce Clause.

A government entity is acting as a market regulator when it enacts rules that "whether by statute, regulation, or contract, . . . have a substantial regulatory effect outside of that particular market." *South-Central Timber*, 467 U.S. at 97. In support of their position, plaintiffs cite the Fifth Circuit case, *New Orleans S.S. Ass'n v. Flaquemines Port, Harbor and Terminal Dist.*, 874 F.2d 1018 (5th Cir. 1989) (holding that a New Orleans port could charge ships traveling the Mississippi River a reasonable port fee for emergency response services without violating the Commerce Clause). This case actually offers support for the City's market participant argument. The court explained

that the Port acts as a market participant when it "offers a service and receives payments tied to the costs of providing the service, just as would a private business. This fee-for-service approach is not a regulation, as, for example, would be a rule requiring every ship to provide its own fire fighting and rescue equipment." *Id.* at 1021. While the court noted that the Port was also acting in its capacity as government regulator of health and safety by using the money for emergency response services, the circumstances here are distinguishable. Nothing about the City's efforts to raise revenue by charging a Skyway toll suggests that it is acting as a regulator rather than a market participant.[11]

Overall, the facts suggest that the City is protected by the market participant doctrine. As such, the district judge correctly dismissed plaintiffs' Commerce Clause claims.

III

For the reasons set forth above, we AFFIRM.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] Even though it considered the Port's activity a hybrid of market regulation and participation, the court in *New Orleans Steamship*, affirmed the district court's dismissal of plaintiffs' claims. The Fifth Circuit held that charging ships for access to certain services was permissible under the Commerce Clause. *New Orleans Steamship*, 874 F.2d at 1022.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois, 60604

November 16, 2000

Before

Hon. DANIEL A. MANION, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. 99-2859

ROY L. ENDSLEY III and STEPHEN GRAHAM, Individually and on behalf of Those Similarly Situated,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 8094—William T. Hart, Judge.

ORDER

The plaintiffs-appellants filed a petition for rehearing en banc on October 26, 2000. No judge in regular service has requested a vote on the petition, and all of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX B

[Dated June 16, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY L. ENDSLEY, III and STEPHEN GRAHAM, individually and on behalf of those similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 98 C 8094
THE CITY OF CHICAGO, a municipal corporation,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Roy Endsley and Stephen Graham bring this action against defendant City of Chicago to contest the City's alleged 1996 decision to use tolls collected on a portion of Interstate Route 90 as a source of general revenue to pay for other city transportation expenses. Plaintiffs seek injunctive relief to reduce the toll rates and to prevent the diversion of toll revenue to fund other transportation projects.[1] Plaintiffs label Count I as violations

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[1] Plaintiffs denominate their complaint as a class action. However, neither party has sought certification of the class. Since

(continued...)

of 23 U.S.C. § 129; Count II as violations of the Sherman Act, 15 U.S.C. §§ 1 and 2; and Count III as violations of the Interstate Commerce Clause of the United States Constitution. Count IV alleges violations of Illinois law. Presently before the court is defendant's Fed. R. Civ. P. 12(b)(6) motion to dismiss Counts I through III and its motion to stay Count IV.

STANDARD OF REVIEW

On a Rule 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations of fact are taken as true and all reasonable inferences are drawn in the plaintiff's favor. *See Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164-65 (1993); *Swofford v. Mandrell*, 969 F.2d 547, 549 (7th Cir. 1992). A complaint need not set forth all relevant facts or recite the law; all that is required is a short and plain statement showing that the party is entitled to relief. Fed. R. Civ. P. 8(a); *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996). A plaintiff in a suit in federal court need not plead facts; conclusions may be pleaded as long as the defendant has at least minimal notice of the claim. Fed. R. Civ. P. 8(a)(2); *Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir.

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[1] (...continued)
class certification has not been promptly sought by either plaintiffs or defendant, class certification will be denied. *See Mira v. Nuclear Measurement Corp.*, 107 F.3d 466, 474-75 (7th Cir. 1997) (class certification should be decided early in a case before any rulings on dispositive motions). The class allegations are dismissed without prejudice because the parties have failed to promptly pursue certification. *See Anderson v. Cornejo*, 1999 WL 35307, at *1 (N.D. Ill. Jan. 11, 1999).

1997). It is unnecessary to specifically identify the legal basis for a claim. *Id.* It is also true, however, that a party can plead him or herself out of court by alleging facts showing he or she has no viable claim. *See Tregenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993); *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992). Further, as long as they are consistent with the allegations of the complaint, a plaintiff may assert additional facts in his or her response to a motion to dismiss. *Albiero*, 122 F.3d at 419; *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir. 1996); *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439-40 (7th Cir. 1994). Although the complaint itself need not specifically or correctly identify the legal basis for any claim, in response to a motion to dismiss that raises issues as to a claim, the plaintiff must identify the legal basis for the claim and make adequate legal arguments in support of it. *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 (7th Cir. 1995); *Carpenter v. City of Northlake*, 948 F. Supp. 759, 765 (N.D. Ill. 1996).

FACTS

According to the complaint, which must be taken as true, the facts are as follows. Defendant maintains and controls the Chicago Skyway Toll Bridge System (the "Skyway") which is a part of the Interstate Highway System. The Skyway is a toll bridge which forms approximately 7.8 miles of Interstate Route 90 extending between the terminus of the Indiana Tollway at the Indiana-Illinois border and the Dan Ryan Expressway, Interstate Route 90/94, in Chicago, Illinois.

The City of Chicago constructed the Skyway in the late 1950's and financed the construction with revenue bonds (the "Original Skyway Bond Issue"). The City continues to operate and maintain the Skyway. Currently, the costs of operating the Skyway are paid solely by vehicle tolls and concessions charged to Skyway users; costs are not supported by City revenues.

The Original Skyway Bond Issue, which paid for initial construction, was refinanced through a series of refunding bonds issued in 1994 (the "Series 1994 Bonds"). The tolls charged on the Skyway have increased several times over the years, largely pursuant to federal court orders in a case brought by bond-holders. The Skyway toll was increased to generate revenue to pay the costs of its operation and maintenance, including debt service on the bonds, and to make the Skyway self-sufficient. These toll increases coupled with increased traffic have resulted in revenues in excess of the total expenses of the Skyway, including debt service.

In 1996, the City issued another series of bonds to refinance the Series 1994 Bonds (the "Series 1996 Bonds"). The sale of the Series 1996 Bonds, in addition to providing funds to repay the aggregate principal of the outstanding Series 1994 Bonds, also provided $52,000,000 to be used for non-Skyway purposes, other transportation related capital projects of the City deemed "City Transportation Improvements."

Plaintiffs' complaint arises from the City's issuance of the Series 1996 bonds repayable from revenues generated by the Skyway tolls. The sole source of revenue pledged by the City for repayment of the Series 1996 Bonds, including the City Transportation Improvements,

are tolls and concessions paid by travelers on the Skyway.

Plaintiffs pay tolls to drive on the Skyway and object to the use of toll revenue to repay bonds, the proceeds of which were used, in part, to finance improvements to parts of the City's transportation system other than the Skyway. Plaintiffs further object to any future use of Skyway toll revenues to pay for additional non-Skyway transportation improvements. It is plaintiffs' position that the City's decision to finance the City Transportation Improvements from toll revenues charged to Skyway travelers improperly increases the costs of interstate travel.

DISCUSSION

Count I

Plaintiffs allege that the Skyway is a part of the National Highway System as defined in 23 U.S.C. § 129, and as such is subject to the provisions of Title 23. Plaintiffs claim that the City's use of Skyway toll revenues violates Title 23 because the revenues are being used for purposes other than financing the costs of construction, operation, reconstruction, resurfacing, restoration, or rehabilitation of the toll facility.

Defendant argues that Count I fails to state any claim under 23 U.S.C. § 129(a)(3) because the federal funds received by the Skyway were not subject to the provisions of that section. Defendant argues § 129(a)(3) is inapplicable for two reasons: (1) federal funding was authorized pursuant to the Intermodal Transportation Efficiency Act

of 1991 ("ISTEA"), Pub. L. 102-240, § 1106(b), 105 Stat. 1914; and (2) federal funds were not devoted to initial construction but rather were used for reconstruction, resurfacing, restoring, and rehabilitating the Skyway or ("4R work"). In the alternative, defendant argues that plaintiffs have no right to enforce compliance with the provisions of § 129(a)(3) should it apply.

Whether § 129 grants plaintiffs a private right of action to enforce compliance with its provisions will be determined first. There are no published opinions that have decided whether a private right of action exists under § 129(a)(3). However, in *Clallam v. Department of Transportation*, 849 F.2d 424, 427 (9th Cir. 1988), the court recognized a private right of action to enforce a different portion of 23 U.S.C. § 301.[2] It is plaintiffs' position that *Clallam* dictates that a private right of action must be recognized for § 129.[3] Defendant argues that nothing in

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[2] Section 301 provides, in pertinent part:

> Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds.

[3] Section 129(a)(1) authorizes federal participation in toll highway projects, providing in pertinent part:

> Notwithstanding section 301 of this title and subject to the provisions of this section, the Secretary shall permit Federal participation in–
>
> * * *
>
> (B) reconstructing, resurfacing, restoring, and rehabilitating a toll highway, bridge, or tunnel . . . or approach thereto;

(continued...)

§ 129 or § 1106(b) indicates that Congress intended private persons to be able to enforce the obligations imposed in those sections.[4]

In *Clallam*, the court held that 42 U.S.C. § 1983 provided an express right of action to enforce § 301. Section 301 is a general prohibition on federal funding of toll facilities because "users of federally funded bridges have an obvious financial interest in toll free bridges and are the primary beneficiaries of Section 301." *Id.* at 428. The *Clallam* plaintiffs argued that they were entitled to be free from tolls under the general proscription of § 301.

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[3] (...continued)

Section 129(a)(3) places limitations on the use of revenues from toll highway projects, providing in pertinent part:

> Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department), having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the tolled facility is being adequately maintained, the State may use any toll revenues in excess amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title.

[4] Section 1106(b) was enacted to provide funds for projects that enhance urban access and urban mobility. The Section lists the dollar amounts allocated for 76 different projects across the nation.

Section 129(a) creates an exception to § 301 and can be raised as a defense to an action claiming a violation of § 301. In the *Clallam* court's view, § 301 provided the "predicate right, if any, giving rise to an action under section 1983." *Id.* at 428. *Clallam* is silent as to whether Section 129 either confers or gives rise to any enforceable private rights. Plaintiffs here are not claiming any rights that arise from § 301, rather plaintiffs' claim is based on § 129.

Plaintiffs cannot point to § 301 and expect that all of Title 23 similarly creates private enforcement rights. Indeed, it must be the "provision in question," not the undifferentiated whole of a federal act that gives rise to a plaintiff's right to sue. *See Blessing v. Freestone*, 117 S. Ct. 1352, 1362 (1997). Thus, because a private right of action is not apparent in either § 129 or § 1106, whether an implied cause of action exists under the statute must be considered.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Supreme Court identified four factors that courts should consider in determining whether an implied cause of action exists: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and (4) whether the cause of action is one traditionally relegated to the state so that it would be inappropriate to infer a federal remedy. *Id.*

In recent years, the Supreme Court has focused primarily on the second factor, legislative intent. *See Suter v. Artist M*, 503 U.S. 347, 364 (1992) ("The most impor-

tant inquiry here . . . is whether Congress intended to create the private right sought by the plaintiffs"); *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532 (1989) ("The 'ultimate issue is whether Congress intended to create a private cause of action' "); *Thompson v. Thompson*, 484 U.S. 174, 189 (1988) ("In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute"); *see also Mallet v. Wisconsin Div. of Vocational Rehabilitation*, 130 F.3d 1245, 1249 (7th Cir. 1997) (collecting cases).

Thus, the primary inquiry is whether Congress intended an implied right of action under § 129(a)(3) and/or § 1106(b) given the language, structure, and legislative history. Where inferences of Congressional intent to create a private right of action are not present, it must be adduced that a private remedy does not exist. *See Mallet*, 130 F.3d at 1249; *Statland v. American Airlines, Inc.*, 998 F.2d 539, 540 (7th Cir. 1993) ("[c]ourts seldom imply a private right of action where none appears in the statute, for a 'strong presumption exists against their creation' "). Moreover, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. *Blessing*, 117 S. Ct. at 1362.

Plaintiff has not identified any portion of the legislative history to support the existence of a private right to enforce the sections in question, nor has this court's own examination revealed any. Nothing in the language, structure or legislative history of the provisions suggests that either provision confers a federal right to plaintiffs.

Defendant characterizes the two sections as being parts of a "massive funding statute," that is "phrased as a gen-

eral directive to a federal agency engaged in the disbursement of public funds, its language provides no support for the implication of a private remedy." It is defendant's position that there is no private right created. *See Lloyd v. Illinois Regional Transportation Authority*, 548 F. Supp. 575, 585 (N.D. Ill. 1982) (the Supreme Court has noted that there "would be far less reason to infer a private remedy in favor of individual persons" where Congress, rather than drafting the legislation "with an unmistakable focus on the benefitted class", instead has framed the statute simply as a general prohibition or a command to a federal agency).

Defendant relies on *Wallace v. City of Rock Island*, 303 F.2d 637, 639 (7th Cir. 1962), to support the position that § 129 does not create a private right of action. In *Wallace*, the court held there was no private right to enforce the terms of a federal statute authorizing construction of toll bridges. *See* 33 U.S.C. § 529. The court found the statute indicated that "Congress has given no right to private persons, as distinguished from the United States and its appropriate agencies, to seek federal court aid to enforce [bridge statutes]." *Wallace*, 303 F.2d at 639. As the district court in *Wallace* explained, "if defendant has violated the federal statutes, that violation may be redressed upon complaint by the United States or an appropriate agency thereof. Any detriment to the motoring public would thereby be alleviated." *Wallace v. City of Rock Island*, 198 F. Supp. 73, 75 (S.D. Ill. 1961).

If the City has violated § 129, any violation may be properly redressed by the Secretary of Transportation (although it is not alleged that any restructure agreement between the Secretary and the City exists). Fur-

ther, § 129 can be distinguished from § 301. Section 301 provides that roads be free of tolls, while § 129(a)(3) governs the use of revenues raised from roads where tolls are collected. Arguably, § 129 is less concerned with creating rights for motorists than § 301, as § 129 generally seeks to structure relations between state highway departments and the Secretary of Transportation when federal funds are devoted to a state project. There is no compelling reason why private persons such as plaintiffs, as distinct from the United States and its appropriate agencies, should have the right to seek federal court action to aid in enforcement of this portion of the statute. Accordingly, Count I will be dismissed.

COUNT II: Sherman Act Claims

Plaintiffs allege that "the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity." (Complaint at ¶ 28) Thus, plaintiffs aver that the City is subject to the requirements of various provisions of federal antitrust law with respect to its proprietary operation of the Skyway. Plaintiffs claim the City's operation of the Skyway violates §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Plaintiffs contend that the Skyway is an essential facility which the City maintains as a monopoly and by conditioning access to that facility on the payment of tolls used to finance other transportation improvements the City is also engaged in an illegal tying agreement.

Sherman Act Section 1

Defendant argues that plaintiffs have failed to state a claim under § 1 of the Sherman Act because plaintiffs

have not alleged a contract or combination between the City and another entity.[5] To make out a claim under § 1 for unreasonable restraint of trade, a party must show: (1) a contract, combination, or conspiracy, (2) a resultant unreasonable restraint of trade in the relevant market, and (3) an accompanying injury. *MCM Partners, Inc. v. Andrews-Bartlett & Assoc. Inc.*, 161 F.3d 442, 448 (7th Cir. 1998).

To satisfy the first element of a Section 1 claim a party must establish concerted efforts between at least two legally distinct entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). Unilateral conduct by a single entity falls outside the scope of Section 1. *Monsanto Corp. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *see also Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986).

Here, plaintiffs allege no contract, combination, or conspiracy of any kind between the City and some other entity or person. The allegations are clear that only the city is claimed to be involved in the alleged misconduct. Because Section 1 does not reach conduct which is uni-

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[5] 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments at the discretion of the court.

lateral, plaintiffs have not stated a claim under § 1 of the Sherman Act.

Sherman Act Section 2

Defendant argues that plaintiffs have failed to state a claim under Section 2 of the Act because plaintiffs have failed to allege any relevant market.[6] Plaintiffs' complaint contains no relevant market allegation. However, plaintiffs respond to defendant's motion by contending that the Skyway is "the only high-speed, limited access connection between [the Indiana Toll Road and the Dan Ryan Expressway in Chicago]." These circumstances, plaintiffs maintain, place the City in control of a monopoly. Plaintiffs further argue that the Skyway is "unique," having "no reasonable substitute for the Interstate Route it covers."

To prove monopolization, a plaintiff must show: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Olympia Equipment Leasing Co.*

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[6] 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding three years, or by both said punishments, in the discretion of the court.

v. Western Union Telegraph Co., 797 F.2d 370, 373 (7th Cir. 1986). Defining the relevant market is a threshold inquiry. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-56 (1993). A plaintiff must allege and define the relevant market in which the defendant has the power to control prices or exclude competitors. *Banks v. NCAA*, 977 F.2d 1081, 1095 (7th Cir. 1992); *Fishman v. Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986).

A relevant market is comprised of those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In making this determination, a court must decide whether the product is unique or has close substitutes, as to which there are substantial cross-elasticities of demand. *Fishman*, 807 F.2d at 531.

Aside from the Skyway, there are substitute routes between Chicago and Indiana. Judicial notice is taken of the location map attached to plaintiffs' responsive pleadings as exhibit A.[7] That map shows that there are other primary competing routes connecting the Indiana Toll Road and the Dan Ryan Expressway located in the Skyway's service area, including Interstate 80/94, consisting of the Borman, Kingery and Bishop Ford Expressways. Other routes include Indianapolis Boulevard/Lake Shore Drive and to a lesser extent, the Tri-State Tollway. Granted, the Skyway may be a shorter route, depending

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[7] Judicial notice may be taken of geographical locations, including the locations of streets and highways. *See Deutch v. United States*, 367 U.S. 456, 470 (1961); *Lowrence v. Pflueger*, 878 F.2d 1014, 1018 (7th Cir. 1989); *State v. Siegel*, 163 Wis. 2d 871, 472 N.W.2d 584, 591 n.15 (1991).

on where the driver's trip begins and ends, but it is not the only route. Thus, defendant does not have a monopoly over travel routes between Chicago and Indiana.

Accordingly Count II will be dismissed.

COUNT III

Plaintiffs claim that the City has discriminated against them and unreasonably burdened interstate commerce in violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, by maintaining arbitrary tolls to raise revenue for non-Skyway purposes which increases the cost of interstate travel on the Skyway. Plaintiffs argue that the tolls burden only persons involved in interstate commerce on the Skyway, but not persons engaged in commerce on other streets and highways of the City who stand to benefit from the other transportation improvements.

Defendant argues that the Skyway toll does not violate the Commerce Clause or discriminate against Skyway users because the tolls are fairly related to benefits conferred by them. In addition, defendant notes that plaintiffs' allegations and arguments in support of its antitrust count suggest that the City is a market participant, rather than a government regulator in its operation of the Skyway. Under this view, defendant argues the City is immune from liability under the Commerce Clause when acting as a market participant.

A plaintiff can "plead himself out of court" by alleging facts which if true would legally preclude a claim. *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7th Cir. 1986); *see also Tregenza*, 12 F.3d at 718; *Early*, 959 F.2d at 79. Here, plaintiffs have done so.

In Count II plaintiffs, among other things, allege:

> Since its inception, the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity.

Plaintiffs' allegations in its antitrust count characterize the City's operation of the Skyway as proprietary. The City's proprietary operation of the Skyway makes the City a market participant, exempt from the Commerce Clause as are other private market participants. Plaintiffs allege that the City charges a toll for use of the Skyway—a proprietary act. There is no allegation that the City charges any other fees or in any way tries to tax all motor vehicles entering into Chicago or crossing the Illinois-Indiana border.[8] While a plaintiff's complaint should not be dismissed merely because it includes invalid claims along with a valid one, *American Nurses*, 783 F.2d at 725, here, the validity of plaintiffs' allegations in the antitrust claim render plaintiffs' Commerce Clause claim invalid by definition.

The Commerce Clause restricts state and local taxes or regulatory measures that impede free trade in the national marketplace. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). Generally, a state may not regulate in a way that favors its own citizens at the economic disadvantage of citizens of other states. *J.F. Shea Co., Inc. v. Chicago*, 992 F.3d 745, 747 (7th Cir. 1993). However, there is an exception to this general rule. The market

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[8] The parties disagree as to whether the fees charged Skyway users are properly categorized as tolls or as taxes. However plaintiffs' complaint repeatedly characterizes the fees as "tolls."

participant exception. For Commerce Clause purposes, a basic distinction exists between states as market participants and states as market regulators. *Reeves*, 447 U.S. at 436. "[I]f a state is acting as a market participant, rather than a market regulator," the Commerce Clause does not limit its activities. *South-Central Timber Development v. Wunnicke*, 467 U.S. 82, 93 (1984). Both state and local governments can be market participants. *See SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 1995).

A government acts as a market participant when it operates in a proprietary capacity as a party to the transaction, charging others for the uses of its service, facilities or products. *See, e.g., Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 912 (8th Cir. 1997); *J.F. Shea*, 992 F.2d at 749 ("when acting as a proprietor, a government shares the same freedom from the Commerce Clause that private parties enjoy"). In contrast, a government is a market regulator if it imposes conditions "that have a substantial regulatory effect outside of that particular market." *South-Central Timber*, 467 U.S. at 97; *see also J.F. Shea*, 992 F.2d at 748.

The allegations pled in plaintiffs' complaint run directly counter to establishing a violation of the Commerce Clause. Plaintiffs' complaint alleges that defendant operated the Skyway as a market participant. Defendant maintains that the tolls are contractual in nature, thus in fact making the City a market participant. *See People ex rel. County of DuPage v. Smith*, 21 Ill. 2d 572, 173 N.E. 2d 485, 491 (1961) (under Illinois law "[s]ervice charges, tolls, water rates and the like are . . . contractual in nature, either express or implied, and are com-

pensation for the use of another's property"). Drivers pay tolls to use the City's property and the City is a party to each transaction. Plaintiffs do not expressly allege any substantial regulatory effect that the Skyway tolls have outside the market in which the City operates and none can reasonably be inferred. Since the only fact consistent with plaintiffs' allegations is that the City acted as a market participant, plaintiffs' claim cannot succeed. Accordingly, Count III will be dismissed.

COUNT IV

Because the federal causes of action are all being dismissed, supplemental jurisdiction over the remaining state law claims will not be exercised. *See* 28 U.S.C. § 1367(c)(3).[9]

IT IS THEREFORE ORDERED that class certification is denied and the claims of the putative class are dismissed without prejudice. Defendant's motion to dismiss [3-1] is granted and defendant's motion to stay Count IV [3-2] is denied as moot. The Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiffs: (1) dismissing individual plaintiffs' federal cause of action with prejudice; (2) dismissing individual plaintiffs' state law cause of action without prejudice; and, (3) dismissing the claims of the putative class without prejudice.

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[9] Plaintiffs are parties to a prior state court action filed in the Circuit Court of Cook County, No. 98 CH 2012.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: JUNE 16, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Roy L. Endsley, III, et al.

v. Case Number: 98 C 8094

The City of Chicago, etc.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to the court's Memorandum Opinion and Order, judgment is entered in favor of the defendant, The City of Chicago and against the plaintiffs' Roy L. Endsley, III, et al.: (1) dismissing individual plaintiffs' federal cause of action with prejudice; (2) dismissing individual plaintiffs' state law cause of action without prejudice; and (3) dismissing the claims of the putative class without prejudice.

Michael W. Dobbins, Clerk of Court

/s/ William J. Stasiek
William J. Stasiek, Deputy Clerk

Date: 6/16/1999

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY L. ENDSLEY, III and STEPHEN GRAHAM, Individually and on behalf of those similarly situated, Plaintiffs,	)	
vs.	)	No.
THE CITY OF CHICAGO, a municipal corporation, Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND MANDATORY INJUNCTIVE RELIEF

NOW COMES the Plaintiffs, ROY L. ENDSLEY, III and STEPHEN GRAHAM, by their attorneys, A. MARK IALONGO and JAMES G. MEYER of Ialongo and Meyer, and LEE J. SCHWARTZ, and complain of the CITY OF CHICAGO, as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1331, ("The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"), and Sec.

1337, ("the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies").

2. Plaintiff, Roy L. Endsley III is a resident of the State of Indiana, a taxpayer of the United States, the State of Indiana and the City of Chicago.

3. Plaintiff, Stephen Graham is a resident of Cook County, State of Illinois, a taxpayer of the United States, the State of Illinois and the City of Chicago.

4. Both Endsley and Graham regularly travel in interstate commerce upon Interstate Route 90 between Illinois and Indiana and pay to the defendant City of Chicago tolls required for such travel.

5. The individual plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all persons traveling in interstate commerce on Interstate Route 90 between Indiana and Illinois who pay tolls for such travel. The class represented by plaintiffs is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class and those questions predominate over any questions affecting individual members; the claims or defenses of plaintiffs are typical of the claims of the class; plaintiffs will fairly and adequately protect the interests of the class; defendant has acted on grounds generally applicable to each class member, thereby making final injunctive relief or corresponding declaratory relief with respect to the class as a whole appropriate; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. Defendant, City of Chicago operates, maintains and controls the Chicago Skyway Toll Bridge System, which is a part of the Interstate Highway System, established pursuant to Title 23 United States Code, Secs. 101 et seq.

7. The Chicago Skyway Toll Bridge System is a toll bridge, which forms approximately 7.8 miles of U.S. Interstate Route 90 and carries interstate commerce between the terminus of the Indiana Tollway at the Indiana-Illinois border, and the Dan Ryan Expressway, Interstate Route 90-94, in Chicago, Illinois. This portion of Interstate Route 90 is hereinafter referred to as "the Skyway portion of Interstate Route 90" or "the Skyway."

8. The Skyway was constructed between 1955 and 1958 and paid for by private funds raised by virtue of Revenue Bonds sold by the City of Chicago in 1955 and 1957 (the "Original Skyway Bond Issue").

9. The costs of operation of the Skyway portion of Interstate Route 90, including the debt service on the bonds, was intended to be, and is, paid solely by vehicle tolls and concessions charged to Skyway users, and is not supported by revenues provided by the City of Chicago.

10. Between 1958 and 1972 the City of Chicago raised the tolls charged on the Skyway portion of Interstate Route 90 three times. In 1972 Skyway bondholders sued the City in the United States District Court for the Northern District of Illinois, to compel the City to raise tolls charged to Skyway users. From 1972 until the dismissal of the litigation in 1994, tolls on the Skyway portion of Interstate Route 90 were raised eleven times pursuant to Federal Court order, and the Court was integrally involved in supervising the application of net

revenues of the Skyway. The current toll rate schedule was set in 1993, by order of the Federal Court prior to the dismissal of the bondholder litigation. The purpose of all toll increases was to generate sufficient revenue from the Skyway portion of Interstate Route 90 to pay the costs of its operations and maintenance, including debt service on the bonds, so as to make the Skyway portion of Interstate Route 90 a self-sufficient enterprise.

11. In 1994 the City issued, and sold to the public, certain Refunding Bonds (the "Series 1994 Bonds") to refund the $90,195,000 aggregate principal amount of the Original Skyway Bond Issue then outstanding.

12. Beginning in approximately 1995 there was a significant increase in the volume of traffic on the Skyway portion of Interstate Route 90. In 1995, because of that increase in volume of traffic, the City received gross toll revenues of $29,517,000, which was more than twice total expenses of the Skyway, including debt service, of $13,655,000. The excess of toll revenues over total expenses has continued through the present, and net revenues produced by tollpayers on the Skyway portion of Interstate Route 90 are projected to be in excess of $15,000,000 a year through the year 2000. The City has estimated that total gross revenue and total operating expenses will increase at comparable rates through the year 2011 so that substantial net revenues will continue.

13. In 1996, due to the increase in net revenue generated by Skyway tolls and concessions, and with the intent to exploit its position as controlling the toll rate schedule of the Skyway portion of Interstate Route 90, the City advance refunded the Series 1994 Bonds with Series 1996 Bonds. The sale of the Series 1996 Bonds

provided funds to repay the aggregate principal amount of the Series 1994 Bonds then outstanding, the costs related to the refinancing and, for the first time, to raise funds for non-Skyway purposes, in the initial amount of $52,000,000, which the defendant has designated as the "City Transportation Improvements."

14. City Transportation Improvements, as defined by the City, are transportation related capital projects of the City of Chicago, which are not related to, or part of, the Skyway portion of Interstate Route 90.

15. The portion of the Series 1996 Bonds designated for City Transportation Improvements is unique in that no part of the $52 million is related to costs generated by Skyway users or expenses incurred by the City in the operation or regulation of the Skyway portion of Interstate Route 90.

16. The City Transportation Improvements are not physically part of the Skyway portion of Interstate Route 90. No revenues generated by, or attributable to, the City Transportation Improvements, nor the Improvements themselves, nor City property improved with City Transportation Improvement funds are pledged as security for repayment of the 1996 Refunding Bonds.

17. The Series 1996 Bonds are not a debt of the City of Chicago or the State of Illinois. The owners of the bonds have no right to force the City or State to levy any tax or appropriate any funds for the payment of the bonds.

18. The sole source of the revenue pledged by the City for repayment of the Series 1996 Bonds, including the City Transportation Improvements, are tolls and conces-

sions paid by travelers on the Skyway portion of Interstate Route 90.

19. The City Transportation Improvements, and the costs of the Series 1996 Bond issue related thereto, provided for in the City's refunding finance scheme, are approximately 31% of the total of the $179,765,000 Series 1996 Bonds sold. Thus, approximately 31% of the costs of amortization paid by travelers on the Skyway portion of Interstate Route 90 will be used to finance the City Transportation Improvements.

20. The Series 1996 Bond scheme additionally provides that Net Revenues from the Skyway portion of Interstate Route 90 (total Skyway revenue after paying all operating expenses and debt service) may be used to pay for additional City Transportation Improvements. Projected Net Revenues of the Skyway between 1996 and 2000, based on the current toll rate schedule, are $11.5 million to $17.1 million, which is 40% to 60% of total toll revenues. The City has estimated these Projected Net Revenues will continue through 2011.

21. The City's decision to finance the City Transportation Improvements from toll revenues charged to travelers on the Skyway portion of Interstate Route 90 produces the effect that the costs of interstate travel for persons using the Skyway portion of Interstate Route 90 are significantly greater than the costs of interstate travel would otherwise be.

COUNT I

VIOLATION OF TITLE 23 UNITED STATES CODE

22. The Skyway portion of Interstate Route 90 is a part of the National Highway System, the National System of Interstate and Defense Highways and the National Intermodal Transportation System established pursuant to Title 23 of the United States Code, and as such, the Skyway portion of Interstate Route 90 is subject to the provisions of that Title.

23. It is the policy of the United States, and the intent of Title 23 of the United States Code, to establish a national system of interstate highways to facilitate an economically efficient means of interstate commerce.

24. The City of Chicago receives funds from the United States Government for the reconstruction of the Skyway portion of Interstate Route 90, and specifically receives federal funds pursuant to the requirements of Title 23, United States Code, Sec. 129.

25. The City's use of toll revenues generated by the Skyway portion of Interstate Route 90 to finance the City Transportation Improvements is unlawful and in violation of Title 23 United States Code, Sec. 129, because toll revenues are being used for purposes other than financing the costs of construction, operation, reconstruction, resurfacing, restoration or rehabilitation of the toll facility.

26. The City's use of toll revenues generated by the Skyway portion of Interstate Route 90 to finance the City Transportation Improvements is further unlawful and in violation of Title 23 in that:

(i) it diverts toll revenues that could otherwise be used for the reconstruction and maintenance of the Skyway, thereby creating the need for Federal funds for that purpose;

(ii) it diverts toll revenues that would otherwise justify a reduction of the current toll rate schedule or retirement of outstanding bonds financed by Skyway tolls;

(iii) it diverts toll revenues from the Interstate Highway System without an agreement with the Secretary of the Department of Transportation.

COUNT II

VIOLATION OF TITLE 15 UNITED STATES CODE

27. This Count is an action brought under the Sherman Act, Title 15 United States Code, Secs. 1 and 2, to remedy the City's exploitation of its monopoly power over the Skyway portion of Interstate Route 90.

28. Since its inception, the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity.

29. The City is subject to the requirements of various provisions of federal antitrust law in regard to its proprietary functions, and specifically is subject to the provisions of Title 15 United States Code, Secs. 1 and 2 in regard to its operation of the Skyway portion of Interstate Route 90.

30. The City's operation of the Skyway portion of Interstate Route 90 is an unlawful violation of Title 15

United States Code, Secs. 1 and 2 in that the City maintains the Skyway portion of Interstate Route 90 as a monopoly affecting interstate commerce and has maintained a toll rate schedule that conditions access to the Skyway portion of Interstate Route 90 to the payment of monies used to finance City Transportation Improvements, and as such is a illegal tying agreement and a per se violation of the law.

31. The City's operation of the Skyway portion of Interstate Route 90 is an unlawful violation of Title 15 United States Code, Secs. 1 and 2 in that the Skyway portion of Interstate Route 90 is an essential facility in interstate commerce which the City maintains as a monopoly and conditions access to the facility on the payment of an arbitrary and unreasonable fee, not reasonably related to the cost of use of the facility.

COUNT III

VIOLATIONS OF THE INTERSTATE COMMERCE CLAUSE OF THE U.S. CONSTITUTION

32. The City of Chicago has enacted a certain ordinance and bound itself in a certain Trust Indenture which provide, in part, that the City would issue and sell Series 1996 Bonds for the purpose of (i) refunding prior Bonds used to finance construction of the Skyway portion of Interstate Route 90, and (ii) finance certain capital expenditures to be made by the City with respect to property used by the City for transportation purposes, other than those related to the Skyway portion of Interstate Route 90 (the "City Transportation improvements"). The ordinance and Trust Indenture further provide that the

sole security pledged for the repayment of the Series 1996 Bonds are the revenues generated by travelers who use the Skyway portion of Interstate Route 90. The ordinance and Trust Indenture further provide that the City will maintain a toll rate schedule on the Skyway portion of Interstate Route 90 at levels sufficient to fund amortization of the bonds, including the bonds issued for City Transportation Improvements.

33. The ordinance and Trust Indenture are unconstitutional and void and in direct conflict with Article I, Section 8, Constitution of the United States, for the reason that the ordinance and Trust Indenture encumber only persons involved in interstate commerce on the Skyway portion of Interstate Route 90, but do not encumber persons engaged in commerce upon other streets and highways of the City of Chicago who benefit from the City Transportation Improvements.

34. The ordinance and Trust Indenture, by regulating the plaintiffs and the class they represent, discriminates against, unreasonably burdens, and impedes the free flow of interstate commerce in violation of Article I, Section 8 of the Constitution of the United States in that it maintains arbitrary tolls to raise revenue for non-Skyway purposes which arbitrarily increases the cost of interstate travel on the Skyway portion of Interstate Route 90.

35. The ordinance and the Trust Indenture, by regulating the plaintiffs and the class they represent, seriously impedes the efficient and uninterrupted flow of interstate commerce which is an integral part of the National Intermodal Transportation System authorized and subject to regulation under Secs. 103 et seq. of the United States

Code, Title 23 in that the toll rate schedule arbitrarily increases the cost of travel on the Skyway portion of Interstate Route 90.

COUNT IV

VIOLATIONS OF THE CONSTITUTION, STATUTES AND COMMON LAW OF THE STATE OF ILLINOIS

36. Supplemental jurisdiction of this Court is invoked in this Count IV under Title 28 United States Code, Sec. 1367 (a), (". . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within the original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution").

37. Article IX, Sec. 2 of the Illinois Constitution provides:

> In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

38. Skyway tolls are taxes or fees within the meaning of Article IX, Sec. 2 of the Illinois Constitution.

39. The portion of Skyway tolls used to finance City Transportation Improvements are in violation of the Constitution in the following respects:

(i) Persons who do not pay the Skyway tolls are equally eligible to receive the benefits of the City transportation Improvements paid solely by Skyway revenues;

(ii) There is no reasonable relationship between the imposition of tolls or taxes on Skyway users and the purpose of the tolls or taxes, the City Transportation Improvements;

(iii) There is no real or substantial difference between Skyway users and all other City street users, as those classes relate to the City Transportation Improvements.

40. The Illinois Constitution, at Article 1, Sec. 2, and the United States Constitution, at Amendment XIV, Sec. 1, provide that no person shall be deprived of life, liberty or property without due process of law nor denied the equal protection of the laws.

41. The Illinois Constitution, at Article 1, Sec. 15, and the United States Constitution, at Amendment V, provide that private property shall not be taken for public use without just compensation.

42. The City's use of the property of Skyway travelers to finance the City Transportation Improvements is a violation of Article 1, Secs. 2 and 15 of the Illinois Constitution, and Amendment XIV and Amendment V of United States Constitution in that there is no rational relationship between the purpose of the payment and the persons obligated to make the payment.

43. The statutes of the State of Illinois, specifically 605 ILCS 5/10-701 through 10-715, grant the City of Chicago the authority to construct the Skyway, issue and sell

bonds to finance such construction, and to issue refunding bonds. The statutes authorize the City to establish tolls on the Skyway and to use toll revenues for the purpose of paying for Skyway operating expenses, amortizing the bond debt and to provide for debt reserve.

44. The City's use of Skyway tolls for other purposes, such as to finance City Transportation Improvements, is a violation of 605 ILCS 5/10-701 through 10-715.

45. The common law of Illinois provides that fees charged for the service provided by a municipal enterprise, such as the tolls charged to the plaintiffs for use of the Skyway, must be reasonably related to the costs of that service, and the municipality or municipal enterprise, such as the City of Chicago in its operation of the Skyway, may not fix fees so as to finance other non-enterprise purposes, such as City Transportation Improvements.

46. The common law of Illinois provides that all contracts, such as the contract between the City of Chicago in its enterprise capacity as operator of the Skyway and the plaintiff Skyway customers, contain an implied covenant of good faith and fair dealing.

47. The City's use of Skyway tolls to finance City Transportation Improvements is a violation of Illinois common law and is therefore unlawful because the tolls are being charged in excess of the cost of operation and regulation of the Skyway and because they are charged in violation of the covenant of good faith and fair dealing.

48. The City's use of Skyway tolls to finance City Transportation Improvements is a violation of the Illinois

Constitution, Article VII, Sec. 6(e)(2) in that it is an occupation tax or service tax which is not authorized by state statute.

49. The City's use of Skyway tolls to finance City Transportation Improvements is a violation of the common law of Illinois in that it is a service fee which is not reasonably related to the cost of the service provided.

WHEREFORE, Plaintiffs pray that this Court:

A. Declare, pursuant to Title 28 United States Code, Secs. 2201 et seq. and Rule 57 of the Federal Rules of Civil Procedure, that the defendant City of Chicago's use of toll revenue generated by the Skyway portion of Interstate Route 90 to finance City Transportation Improvements is unlawful, illegal and void for the reasons set out in this Complaint;

B. Order the defendant City of Chicago, pursuant to Title 14 United States Code, Secs. 1 et seq., to account for toll revenue generated by the Skyway portion of Interstate Route 90 that has been used to amortize the Series 1996 Bonds, to the extent the bonds are used to finance City Transportation Improvements;

C. Enjoin the defendant City of Chicago, pursuant to Title 14 United States Code, Secs. 1 et seq., from collecting that portion of tolls on the Skyway portion of Interstate Route 90 that will be used to amortize the Series 1996 Bonds, to the extent the bonds are used to finance City Transportation Improvements;

D. Find that this action may proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

E. Award the Plaintiffs and the class they represent their costs and expenses of this action, including reasonable attorneys' fees, and;

F. Grant Plaintiffs and the class they represent such other and further relief as is just.

ROY L. ENDSLEY, III and STEPHEN GRAHAM, on their behalf and on the behalf of all others similarly situated,

_____

One of their attorneys

A. Mark Ialongo
James G. Meyer
Ialongo & Meyer
225 W. Washington St., Suite 1014
Chicago, Illinois 60606
312-332-4701

Lee J. Schwartz
30 N. LaSalle St., Suite 2300
Chicago, Illinois 60602
312-553-5050